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CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 748

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER, AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP,
Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia

---

BRIEF OF RESPONDENTS.

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TABLE OF CONTENTS

	Page
Opinions	1
Statement of the Case	2
Statutes Involved	5
Question Presented	6
Summary of Argument	7
Argument	8
I. The Findings of the Commission Determine and Establish Injury to the Respondents Resulting from the Violations of Law by Defendant Carriers, the Amount of Resulting Damage Sustained, and the Right of Respondents to an Award of Reparation for the Damages so Found	8
II. The Writ of Mandamus is the Remedy Proper to Secure the Performance by the Commission of its Statutory Duty to Enter an Award of Reparation for the Amount of Damages Found to have been Sustained	16
Conclusion	21
Appendix	23

CASES CITED

Birch Valley Lumber Co. v. S. C. & M. R. R. Co., 144 I. C. C. 419	1
Buffalo Union Furnace Co. v. L. S. & M. S. Ry. Co., 44 I. C. C. 267	13
Donner Steel Co. v. D. L. & W. R. R., 57 I. C. C. 745	10
Donner Steel Co. v. I. C. C. 285 Fed. 955	9
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285	11
I. C. C. v. L. & N. R. R. Co., 227 U. S. 88	19
I. C. C. v. Waste Merchants' Assoc., 260 U. S. 32	20
Life & Fire Ins. Co. v. Wilson, 8 Pet. 291	18
Louisville & N. R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288	12
Mills v. Lehigh Valley R. R. Co., 238 U. S. 473	8
Parsons v. Chicago & N. W. Ry. Co., 167 U. S. 447	8
Penna. R. R. Co. v. Int. Coal Min. Co., 230 U. S. 184	8, 11, 15
Procter & Gamble v. U. S., 225 U. S. 282	20
Swift Lumber Co. v. F. & G. R. R. Co., 61 I. C. C.	14, 15
U. S. v. Harris, et al, 77 Fed. 821	17

STATUTES CITED

Interstate Commerce Act.

Section 3 (1), Title 49, U. S. C. A.	5, 23
Section 8 , Title 49, U. S. C. A.	5, 23
Section 9 , Title 49, U. S. C. A.	6, 23
Section 13 (1), Title 49, U. S. C. A.	6, 24
Section 14 (1), Title 49, U. S. C. A.	6, 24
Section 16 (1), Title 49, U. S. C. A.	6, 25

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BRIEF OF RESPONDENTS.

OPINIONS.

Respondents' right to the writ of mandamus directed to the Interstate Commerce Commission is determined by the Commission's report entitled *Birch Valley Lumber Company v. Strouds Creek & Muddlety Railroad Company, et al,* 144 I. C. C. 419, which accompanies the

respondents' petition as Exhibit F, set out in full on pages 28-37 of the record.

The memorandum opinion of the Supreme Court of the District of Columbia overruling the demurrer to the answer of the Commission appears on page 50 of the record.

The opinion of the Court of Appeals of the District of Columbia reversing the Supreme Court has not been published but appears on pages 53-59 of the record.

STATEMENT.

The statement of the case in petitioner's brief (except as to certain details hereinafter referred to) adequately presents the facts involved in the proceedings before the Commission and in the courts below.

However the interpretation placed upon the opinion of the Court of Appeals by the petitioner is not warranted by the opinion itself. On page 17 of the petitioner's brief it is said with respect to that opinion:

> "The accompanying opinion held in substance that there was inconsistency between the Commission's findings of fact and its *conclusion that respondent had not been damaged* as a result of violations of the Interstate Commerce Act committed by the railroads, and as no other remedy was available, mandamus would lie to compel the Commission to make the award. (R. 53-59)" (Italics ours.)

The Commission *did not find or conclude* that respondents had not been damaged. Its conclusion that "the record will not support an award of reparation" did not purport to be based on a finding that respondent had not been damaged. That the Court of Appeals clearly had in mind the Commission's findings of recoverable dam-

age is shown by its statement "In this case the Commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss." (R. 58.)

It may be noted also that the reasonableness of the rate attacked was not in issue before the Commission. While the complaint filed with the Commission alleged that the rate was unreasonable, in violation of Section 1 of the Interstate Commerce Act, upon the hearing complainant's evidence went to the support of its allegations of undue prejudice to complainant and undue preference of complainant's competitors, in violation of Section 3 (1) of the Interstate Commerce Act and the resulting pecuniary loss to the complainant. This appears from the following extract from the Commission's report:

> "Complainant, however, does not question the reasonableness *per se* of the blanket or group rates from Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high." (R. 33.)

The findings made by the Commission with respect to the violation of law by the defendant carriers and the resulting damage to the shipper may be summarized in the following quotations from its report.

The violation of Section 3 (1) of the Interstate Commerce Act in the exaction of unlawful charges by defendant carriers is est blished by the Commission's finding that the rates assailed "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general ori-

gin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va." (R. 36.) Allingdale is the junction point.

The injury and the amount of the damage to the complainant, resulting from such violation of law, are established by the Commission's findings set out in its report, that:

> "On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction point." (R. 30.)
>
> "The charge of the S. C. & M. is prepaid by the shippers." (R. 30),
>
> "Complainant's prices are all quoted f. o. b. Allingdale, W. Va." (R. 29),
>
> "The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory." (R. 30), and
>
> "In the present case complainant's competition is mainly with the mills in the same general territory, which includes the other groups where the junction-point or group rates apply from points on certain short line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant, and intervenor, are forced to base their prices on the group rates, and absorb the charges of the S. C. & M." (R. 35-36.)

It may be noted further that the finding last quoted prevents any confusion as to the identity of the person injured by the unlawful acts of the carriers, since it de-

termines that the complainant was forced to and did absorb the unlawful charge.

For reasons peculiar to practice and procedure before the Commission, the complainant was not required at the hearing upon the complaint to show the total number of cars which had moved at the rate complained of. It appeared, incidentally, from the evidence as shown by the Commission's report, that during one six-month period a total of 565 cars moved from points on the S. C. & M. to various destinations. Where a complainant before the Commission shows a right to an award of reparation, it is the practice (if there is a dispute as to the amount of damage) to determine the amount of damage suffered by complainant, and the reparation to which he is entitled, in a supplemental proceeding. This is sanctioned by the Commission under its Rule V, quoted in full in Paragraph XI of the petition. (R. 4, 5.) This rule finds its inception in the policy of the Commission to avoid encumbering the record with a mass of detail which would serve no purpose if reparation be denied, and explains the absence from the Commission's report of the number of cars upon which the unlawful charge of $15 had been paid.

STATUTES INVOLVED.

The rights of the respondents are determined by Sections 3 (1) and 8 of the Interstate Commerce Act (U. S. C. A. Title 49). Section 3 (1) prohibits any undue or unreasonable preference of, or any undue or unreasonable prejudice to, any shipper. Section 8 provides that every common carrier shall be liable for any violation of the act to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

The remedies by which the respondents may secure those rights are determined by Sections 9, 13 (1) and 16 (1) of the Interstate Commerce Act (U. S. C. A., Title 49). Section 9 provides that any person damaged may elect to recover therefor either before the Commission or in the Federal Courts. Section 13 (1) provides for the prosecution before the Commission of any complaint made by a shipper against a carrier subject to the Act. Section 16 (1) directs the Commission to enter an order for an award of reparation upon the determination by the Commission that the shipper has been damaged as a result of the carrier's violation of the statute.

By the provisions of Section 14 (1) (U. S. C. A., Title 49) the Commission is required to make a written report in which it shall state its conclusions, decision, order, and findings of fact on which an award of damages is made.

The text of the Sections above referred to is found in the Appendix to this brief.

QUESTION PRESENTED.

On page 3 of petitioner's brief it is stated that "The ultimate question here raised is whether the Court of Appeals of the District of Columbia did not err in concluding that mandamus would lie to compel the Commission to reach a different judgment and issue an award of damages."

Respondents do not seek to compel the Commission to reach a "different judgment". Respondents do seek to compel the Commission to *enter an order making effective* its judgment and discretion *already exercised*, to wit, its determination that as a result of defendant carriers' unlawful acts and practices respondents have suffered

injury and resultant damage in a definite and specified amount.

We submit that the questions presented are (1) whether the findings of fact made by the Commission established respondents' right to recover damages, and if so, (2) whether mandamus is a remedy proper to secure an order of reparation for the damages sustained.

SUMMARY OF ARGUMENT.

The record made on hearing before the Commission is not before this Court. Therefore the rights of respondents are to be determined upon the findings of the Commission set out in its report. (R. 28-37.)

There is no question involving the administrative action of the Commission. In the exercise of its administrative function the Commission held the assailed rates unlawful for the *past*, present, and future. The defendant carriers complied with the order of the Commission to cease and desist from practicing the undue prejudice and preference found to exist, and to maintain and apply regulations and practices which would prevent and avoid said undue prejudice and preference. (Order, R. 41.). That order became effective on January 14, 1929 (R. 8), and has remained effective since.

After making the administrative determination that the assailed rates were unlawful for the past, the Commission in the exercise of its quasi-judicial function proceeded to consider the question of damage to respondents caused by the exaction and collection of the unlawful charges by defendant carriers during the statutory period. Upon that consideration the Commission made certain findings of damage which respondents contend entitle them to an award of reparation.

Therefore this brief will be devoted to a discussion of the propositions that:

1. The findings of the Commission determine and establish injury to the respondents resulting from the violations of law by defendant carriers, the amount of resulting damage sustained, and the right of respondents to an award of reparation for the damages so found.

2. The writ of mandamus is the remedy proper to secure the performance by the Commission of its statutory duty to enter an award of reparation for the amount of damages found to have been sustained.

ARGUMENT.

I.

The Findings of the Commission Determine and Establish Injury to the Respondents Resulting from the Violations of Law by Defendant Carriers, the Amount of Resulting Damage Sustained, and the Right of Respondents to an Award of Reparation for the Damages so Found.

Before proceeding to a discussion of the question presented for this Court's determination we desire to eliminate any controversy regarding certain well settled propositions of law argued at length in petitioner's brief.

To recover damages for a violation of the Interstate Commerce Act a shipper must show the violation of law by the carrier, and that such violation has resulted in an injury to the shipper. The measure of damages for such injury is the pecuniary loss sustained by the shipper as a result of the carriers' wrongful acts. *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U. S. 447; *Penna. R. R. Co. v. International Coal Min. Co.*, 230 U. S. 184; *Mills v.*

Lehigh Valley R. R. Co., 238 U. S. 473. At no stage of this proceeding have respondents maintained that recovery can be had without proof of damage. We do contend, as the court below held, that the respondents (complainant before the Commission) proved damages in the amount of $15 per car for each and every car shipped for which the unlawful rate was paid by the complainant. The findings made by the Commission in its report conclusively establish the loss of the shipper complainant and the liability of the defendant carriers.

On pages 24 and 25 of petitioner's brief the holding of the Court of Appeals that the Commission's report showed that it had found as a fact that complainant was damaged in the amount of $15 per car, is imputed to a supposed view that "the Court may have considered that the finding of the fact of damage was comprehended in the Commission's finding of undue prejudice, which it sets out in quotations, namely the finding that the rates 'were, are, and for the future will be, unduly prejudicial to complainant'." With respect to the view of the court below it is further stated on page 25 of petitioner's brief that "2. The Court's statement that the Commission had found 'the amount of loss' is plainly based on the fact that the rates were found to be unduly prejudicial to the extent that they exceeded the rates from the group which includes Allingdale, namely, the sum of $15, charged by the S. C. & M. to Allingdale, which constituted the difference between the rates paid by respondent and the rates of those of its competitors in the Allingdale group."

There is nothing in the opinion of the Court of Appeals which warrants the interpretations quoted above. The contrary is shown by its distinction (R. 57) between the instant case and the case of *Donner Steel Co. v. I. C. C.*,

285 Fed. 955, a decision of the same court. In the *Donner Steel case* the Commission had found that the practice complained of had been unduly prejudicial to complainant in violation of Section 3, but that complainant had not shown resulting damage. *Donner Steel v. D. L. & W. R. R.*, 57 I. C. C. 745. In its opinion (R. 57) the Court below said, with respect to its previous decision in the *Donner Steel case:*

> "Our conclusion in refusing to order the writ to issue was based on the ground that the Commission had definitely and unmistakably decided from the evidence before it that the shipper *had not been damaged,* * * *" (Italics ours).

Moreover it appears affirmatively from the opinion of the Court below that its decision, that the Commission had found as a fact that complainant had established recoverable damage, was based upon definite and specific findings of fact set out in the Commission's report. For example the Court said:

> "The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's *prices were all quoted f. o. b. Allingdale;* that it sold its lumber in *competition with that produced in the same general territory,* and was *forced to base its price on the group rates* and *to absorb the $15 per car charge* of the Strouds Creek road." (R. 54) (Italics ours.)

"From what we have already said, it is obvious that in this case appellant has shown, and the commission has found, the violation of law complained of, and likewise that appellant has sustained an injury and pecuniary loss by reason of the injury to the extent of $15 for each car of lumber shipped within the statutory period." (R. 55-56.) and

"In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of fact to indicate it." (R. 58.)

The above quoted extracts from the opinion of the Court of Appeals summarize the findings made by the Commission in the exercise of its "judgment and discretion", both as to the prescription of the administrative standard of the rates involved, and as to the judicial inquiry into the question of the rights of the shipper dependent upon "whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate." *Great Northern Rwy. Co. v. Merchants Elevator Co.*, 259 U. S. 285.

Respondents rest their case and their right to recovery upon the determination so made by the Commission of the issues of fact presented for its decision. The right of respondents to an award of reparation is determined by the law of damages, not by the whim of the Commission. Certain principles directly applicable to this case were laid down by this Court in *Pennsylvania R. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, where it was said:

"The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because Sec. 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it should be '*liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation * * * together with a reasonable * * * attorneys' fee*'." (P. 203).

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." (P. 204).

"* * * the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be, and whether greater or less than the rate of rebate paid." (P. 206).

When a shipper elects to prosecute his claim for damages before the Commission he submits his cause for determination in accordance with the evidence submitted and the law of damages applicable thereto. In deciding the cause the Commission exercises a quasi-judicial function, and the rule of damages to be applied is defined by the following language used by this Court in *Louisville & N. R. R. Co., v. Ohio Valley Tie Co.*, 242 U. S. 288, 290:

"By Section 8 a common carrier violating the commands of the act is made liable to the person injured

thereby 'for the full amount of the damages sustained in consequence' of the violation. (24 Stat. at L. 382, Chap. 104, Comp. Stat. 1913, Section 8572.) By Section 9 any person so injured may make complaint to the Commission or may sue in a Court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by Section 16 * *. The decisions say that whatever the damages were, they could be recovered * * *."

There are six distinct findings in the report of the Commission establishing the fact and the amount of damages. The finding last quoted that "there appears to be no question that complainant, and intervener, are forced to base their prices on the group rates, and absorb the charges of the S. C. & M." (R. 35-36), is alone sufficient to establish respondents' (complainant's) right to recover. The Commission itself has followed and applied this rule. In *Buffalo Union Furnace Co. v. L. S. & M. S. Ry. Co.*, 44 I. C. C. 267, reparation was awarded for charges which the Commission held unduly prejudicial to the complainant and which charges it "was compelled to absorb".

The principles governing the award in that case, and equally applicable in this case, are set forth at page 270 of the report where it was said:

> "In the instant case no rebate is involved; the pleadings sufficiently allege damages arising out of the unlawful discrimination which we have found to exist; and there is sufficient evidence to prove that the wrong of the carrier has in fact operated to complainants' injury.

"The furnace company was in competition with the Lackawanna Steel Company, the Cleveland Furnace Company, and many other iron manufacturers located in western Pennsylvania and eastern Ohio. There was competition between these manufacturers in the purchase of coal, coke, limestone, iron ore, and various other materials. Other furnaces in the Buffalo-Black Rock switching district received their raw materials at the same line-haul rate, and the cars consigned to certain of these furnaces were spotted by the trunk lines or allowances for spotting were made to the industrial roads. The transportation charges paid by the furnace company were higher than those paid by its competitors for a service substantially similar in all respects. Complainant furnace company and these competing furnaces were engaged in manufacturing the same kinds of iron, which were sold in the same competitive markets. 21 I. C. C. 625. It was forced to meet and did meet the prices at which its competitors sold. Under such circumstances it was impossible to add the cost of performing the terminal switching to the selling price of such products. In consequence complainant was compelled to *absorb that cost* out of its profits. It *inevitably follows* that the complainant furnace company suffered a loss in profits measured by the cost of that interchange switching service, and we find that it *was damaged to the extent of such cost.*" (Italics ours.)

With respect to the case of *Swift Lumber Co. v. Fernwood & Gulf R. R. Co.*, 61 I. C. C., discussed in petitioner's brief, it seems sufficient to refer to the report of the Commission in this case wherein it pointed out both the features of similarity and of distinction between that and the instant case. While undue prejudice in that case was found to exist, reparation was denied.

"The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory." (R. 35.)

The report of the Commission in the *Swift Lumber case* further indicates that reparation would have been awarded upon shipments made to markets in competition with other producers in the blanket territory had the complainant shown that it paid and bore the freight charges. At page 491 it was said:

"Complainant has shown that it made shipments to points in Tennessee upon which rates made by combination upon Fernwood were applied, but has failed to show that it paid and bore the freight charges thereon. Reparation is accordingly denied."

That the respondents here did pay the unlawful freight charge of $15 per car is, of course, established by the Commission's express finding that "the charge of the S. C. & M. is prepaid by the shipper." (R. 30). That respondents bore the unlawful charges is shown by the finding of the Commission, "but there appears to be no question that complainant and intervener are forced to base their prices on the group rate and absorb the charges of the S. C. & M." (R. 35-36).

In none of the cases cited by petitioner has the Commission failed to award reparation to the injured shipper where it was shown that the shipper paid and bore the unlawful charge, that his competitors did not pay the unlawful charge, that he was forced to *base his selling price on,* and *was compelled to absorb,* the unlawful charge.

Under the rule laid down by the Supreme Court in *Penna. R. R. Co. v. International Coal Min. Co.*, 230 U. S.

184, there can be no question that the Commission found every element of damages essential to a recovery. The Commission not only made a direct finding of unlawfulness of the rate in the past, but also found that the shipper was injured and damaged thereby in the amount of $15 for each car for which the shipper was charged the unlawful rate.

II.

The Writ of Mandamus is the Remedy Proper to Secure the Performance by the Commission of its Statutory Duty to Enter an Award of Reparation for the Amount of Damages Found to Have Been Sustained.

It should be stated at the outset that respondents recognize that mandamus will not issue to compel a "particular exercise of judgment or discretion." But the Commission had fully and completely exercised its judgment and discretion in making the determinations set out in its report.

After making those findings of violation of law by defendant carriers and resulting damage to the shipper, the Commission concluded its report with the brief statement that

> "The record will not support an award of reparation based on the undue prejudice found to exist." (R. 36.)

Viewing the quoted conclusion in the light most favorable to the contention of the Commission, it represents nothing more than the Commission's conception of the duty imposed upon it by the statute. Respondents concede, moreover they insist, that findings of fact by the

Commission are final in their nature and must stand undisturbed as made. But a mistaken or contradictory conclusion will be corrected by the Court. A judgment cannot stand when based on conclusions of law which are at variance with the findings of fact. Neither can a judgment stand when based on purported findings of fact which are in effect mere legal conclusions.

The conclusion made in direct contradiction to the express findings is a nullity. As stated by the Court below (R. 38):

> "Hence it follows that the determination of the commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact and therefore contrary to the provisions of the act. In such a case the granting of the writ is not the control of a particular discretion or a substitution of the judgment of this court for that of the commission but a lawful order to the commission to carry into effect the plain result of the exercise by it of its discretion—a situation in all respects analogous to an order to an inferior court to sign a judgment which it rendered but refused to sign."

A conclusion following, and at variance with, a finding of fact does not control or affect the finding made, but will be treated as mere surplusage. In this case the conflict of the conclusion with the findings of fact is parallel to the case of *U. S. v. Harris, et al*, 77 Fed. 821, in which the Court set aside a judgment based upon a conclusion in conflict with the findings of fact. In that case the Circuit Court of Appeals for the Seventh Circuit said:

> "It is insisted, however, that the question of setoff is determined by the last sentence of the finding, wherein the Court said: 'Under the evidence adduced

> at the trial in relation thereto, I *find that no set-off or recoupment* in favor of the government and against this claim *exists*. That expression has no proper place in the finding. *It is the statement of a conclusion, and does not control or affect the fact explicitly and properly stated*, that Harris had received of postmasters, upon forged orders the sum of $600, which, in the absence of any *statement of fact to the contrary*, will be presumed to have belonged to the Government * * *." (Italics ours.)

Respondents seek, not a writ of mandamus directing the exercise of discretion, but a writ compelling the entry of an order by the Commission carrying into effect the result of the exercise of its discretion. Section 16 of the Interstate Commerce Act provides that the Commission "*shall make an order*" awarding reparation when, after hearing, it finds that a shipper has been damaged by a violation of the Act. The duty to enter such an order *after* finding the requisite violation and resulting damage, involves no discretion on the part of the Commission and it is purely ministerial in nature. Therefore, the failure of the Commission to obey the positive mandate of the statute will be corrected by a writ of mandamus.

The action of the Commission sought here is not judicial in character, and the situation is analogous to that in *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949, in which the Supreme Court said at page 954:

> "On a mandamus a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide. But, so far as it regards the case under consideration, the signature of the judge was not a matter of discretion.

It followed as a necessary consequence of the judgement, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act."

The award of damages to an injured shipper is not a matter of grace at the option of the Commission. The duty to accord a hearing and decide in accordance with the evidence is positive and mandatory under the statute. In *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 91, this Court said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. * * *

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' * * * or if the facts found do not, as a matter of law, support the order made (U. S. v. Baltimore & O. S. W. R. Co., 226 U. S. 14, ante 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 20, 51 L. Ed. 942, 27 Sup Ct. Rep. 585; Wisconsin, M & P R. Co. v. Jacobson, 179 U. S. 301, 45 L. Ed. 201, 21 Sup. Ct. Rep. 115; Washington Ex. Rel. Oregon R. (92) & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77.)"

As pointed out by the court below the order complained of is negative in character and hence is not reviewable under *Procter & Gamble v. U. S.*, 225 U. S. 282. The only remedy available to respondents for the correction of the Commission's error is the writ of mandamus.

Petitioner's argument that mandamus is not the proper remedy is based upon the premise "that mandamus, as granted by the lower court, would compel the Commission to award reparation contrary to its judgment and discretion". Based upon this erroneous premise the decision of this Court in *Interstate Commerce Commission v. Waste Merchants' Association*, 260 U. S. 32, is cited as authority for denial of the writ.

But in that case the "Petitioners sought in the proceeding to set aside the adverse decision of the Commission *on the merits* and to *compel* a decision in *their favor.*" (Italics ours).

In the exercise of its judgment and discretion the Commission had made its findings that the rates charged were neither unreasonable nor discriminatory. In that case a petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia. It prayed that the Commission be directed to take jurisdiction of the claims, *allow damages*, and fix the amount thereof.

Obviously the issuance of the writ of mandamus in that case would have compelled the exercise of discretion in a particular manner, and in a manner directly contrary to the action already taken by the Commission for, as stated at page 34:

> "It (the Commission) heard the case fully. It found that the rates charged were not unreasonable or discriminatory, in violation of the Commerce Act, nor unreasonable for the service actually performed, in violation of the Federal Control Act."

None of the decisions of this Court, nor of the Court of Appeals of the District of Columbia cited by the petitioner, are in conflict with the decision of the Court of Appeals in the case at bar, for the reason that all the cases cited attempt, either to set aside administrative standards prescribed by the Commission, or to compel the Commission to make particular findings of fact in its quasi-judicial capacity. Far from seeking to set aside administrative standards prescribed by the Commission, or the findings of the Commission made in its quasi-judicial capacity, the respondents right to recover is grounded upon the administrative standard *and* findings as made by the Commission.

Conclusion.

The facts established by the Commission's findings, set out in its report, are:

1. That the rates exacted of complainant and accorded to its competitors, were unduly prejudicial to complainant and unduly preferential of its competitors to the extent of $15 per car, and therefore unlawful as violative of Section 3 (1) of the Interstate Commerce Act.

2. That by reason of the unlawful rates complainant was compelled to quote its prices f. o. b. Allingdale and was required to pay, and did prepay, a charge of $15 per car for the transportation of its lumber from its mills to Allingdale.

3. That the lumber was sold in competition with other lumber produced in the same general territory and enjoying the unduly preferential interstate through rates $15 per car less than complainant's lumber, and

4. That complainant was forced to base its selling price on the group rates accorded its competitors and absorb the unlawful charges of $15 per car to the junction point, Allingdale, W. Va.

Upon the fact of these findings of damage and the amount of the pecuniary loss per car, the Commission had no choice in awarding reparation, but had the positive and mandatory duty imposed by the mandatory provision of Section 16 of the Interstate Commerce Act to enter an order awarding reparation. Its conclusion that "the record will not support an award of reparation" is clearly in conflict with its findings of fact, is arbitrary, and without legal effect.

The order denying reparation being a negative order, mandamus is the only remedy available to the injured shipper. Mandamus will lie to compel the Commission to do that which it was obliged to do upon its own findings of damage, namely: to enter an order of reparation in favor of respondents.

The judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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April 15, 1933.

APPENDIX.

Applicable Sections of the Interstate Commerce Act.

Section 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

U. S. C. A., Title 49.

Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

U. S. C. A., Title 49.

Section 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction;

but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *.

U. S. C. A., Title 49.

Section 13 (1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

U. S. C. A., Title 49.

Section 14 (1). Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

U. S. C. A., Title 49.

Section 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

U. S. C. A., Title 49.